No. 06-789

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ROGER DRACH,

Petitioner,

v.

LOUIS BRUCE and THE STATE OF KANSAS,

Respondents.

On Petition For Writ Of *Certiorari* To The Supreme Court Of Kansas

REPLY OF THE PETITIONER

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ARGUMENT

As to whether *Crawford v. Washington*, 541 U.S. 36 (2004), ought to be applied retroactively to cases on collateral review, Petitioner Roger Drach agrees with the respondents that on this question the Court should hold his petition pending the Court's forthcoming decision in *Wharton v. Bockting*, 126 S. Ct. 2017 (2006), just as it has for the petitions pending in *New Mexico v. Forbes*, Case No. 05-644 (U.S. filed Nov. 17, 2005), and *Lave v. Quarterman*, Case No. 05-11552 (U.S. filed June 16, 2006).

Whether Kansas's unique, extra-statutory "marital discord" hearsay exception violates the Confrontation Clause, however, clearly is a question that merits this Court's writ of *certiorari* without awaiting a pending decision. The respondents premise their argument on the assertion that a decision "in this case has no future implications and would only apply to a fleeting number of *past* Kansas cases given the Court's decision in *Crawford*, which altered the Confrontation Clause analysis in the context of hearsay evidence rules" (Respondents' Brief in Opposition 6). While the respondents are correct that the marital discord exception will not be used in Kansas in the future, that fact has nothing to do with this Court's decision in *Crawford*, and it should not operate to prevent this Court from granting its writ of *certiorari* over this question.

In *Crawford*, this Court expressly held that its alteration of Confrontation Clause analysis in that case only applied to testimonial hearsay, such as is at issue in Mr. Drach's case. 541 U.S. at 62. Recently, this Court reaffirmed that its holding in *Crawford* only applies to testimonial hearsay. *Davis v. Washington*, 126 S. Ct. 2266,

2273 (2006). Therefore, the two-part *Roberts* test – whether the hearsay was admitted under a "firmly rooted" exception or whether it bears "particularized guarantees of trustworthiness" – endures when the admission of non-testimonial hearsay is at issue. *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

Accordingly, even post-*Crawford*, Kansas courts continued to admit hearsay under the "marital discord" exception in marital homicide cases. In *State v. Patton*, 120 P.3d 760 (Kan. 2005), decided nearly a year after this court handed down its decision in *Crawford*, the Supreme Court of Kansas employed the marital discord exception to uphold the admission of hearsay testimony that the defendant and his wife had marital difficulties in order to show that the defendant had murdered his wife for financial gain. *Id.* at 780. Although the defendant had argued that the admission of hearsay under the marital discord exception violated the Confrontation Clause, the Kansas court did not even refer to any decision of this Court – including *Crawford* – in rendering its decision otherwise. *Id.*

In October of 2006, however, only four months after the Supreme Court of Kansas rendered its decision in the case at bar, it finally struck down the marital discord exception to the hearsay rule. *State v. Gunby*, 144 P.3d 647, 658 (Kan. 2006). In *Gunby*, the Kansas court ruled that all "ways around application of and safeguards attendant to" Kansas's statutory hearsay rule regarding "other crimes and civil wrongs," K.S.A. § 60-455, "must be abandoned, not only because they lack reliable precedent but because they were never necessary in the first place." *Id.* at 659. This – and only this – put an end to Kansas's history of unconstitutionally admitting hearsay testimony

in marital homicide cases under the marital discord exception: the Kansas court realized the unreasonableness of the exception it had created forty years earlier. That same unreasonable and unconstitutional exception, however, remains the sole justification for the admission of the only evidence which tipped the scales in Mr. Drach's trial in favor of the prosecution. This Court should not let such an injustice stand.

Thus, Mr. Drach lingers as the vestigial victim of a Kansas legal regimen so unreasonable that even the body which created it now has discarded it. Does this, as the respondents argue, mean that this question, which is Mr. Drach's last possible claim against the admission of the hearsay testimony, "does not merit this court's review" (Respondents' Br. 5)? Hardly.

Chief Justice Rehnquist once noted, "there are really only three factors comprised in the *certiorari* decision -- conflict with other courts, general importance, and perception that the decision is wrong in the light of Supreme Court Precedent." Rehnquist, THE SUPREME COURT – HOW IT WAS, HOW IT IS 266 (1987). *See also* Supreme Court Rule 10(c) (*certiorari* review is justified when "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"). Mr. Drach is not asking this Court to grant its writ of *certiorari* to answer a question of "general importance" or address a conflict among states or federal circuits. Rather, review is warranted because the decision of the Supreme Court of Kansas upholding the admission of hearsay testimony under its unique marital discord exception clearly conflicts with this Court's decisions regarding the admission of hearsay testimony and state law exceptions

to the hearsay rule in *Roberts*, *Idaho v. Wright*, 497 U.S. 805 (1990), *White v. Illinois*, 502 U.S. 346 (1991), and *Lilly v. Virginia*, 527 U.S. 116 (1999), as set out in detail in Mr. Drach's petition (Petition 14-22).

In the Supreme Court of Kansas, Mr. Drach argued that the admission of hearsay under the marital discord exception was unconstitutional in light of these very relevant decisions, all of which concerned state exceptions to the hearsay rule. The Kansas court held otherwise. The resulting conflict between the decision of the Kansas court and the relevant decisions of this Court is undeniable. The respondents do not suggest otherwise, nor have they ever done so at any stage of the proceedings below. This unabashed conflict, analogous to the questions presented in *Wright*, *White*, and *Lilly*, justifies *certiorari*. Those cases establish the boundaries of the Confrontation Clause. They do not permit states to admit hearsay erroneously under exceptions which fall outside those boundaries. Mr. Drach suffers from just such an unconstitutional error.

Additionally, *res judicata* does not operate in this case to serve as "an independent and adequate state law ground," as the respondents argue (Respondents' Br. 2). The respondents are correct that *res judicata* customarily does operate as an independent and adequate state law ground. Where that state law ground is premised on a holding of this Court, however, it no longer serves as a function of state law, but rather presents a federal question (Petition 23-24). Here, Kansas adopted its doctrine of *res judicata* from the decision of this Court in *Teague v. Lane*, 489 U.S. 288, 297 (1989). *See State v. Neer*, 795 P.2d 362, 366 (Kan. 1990). The respondents do not argue otherwise. Therefore, whether the Kansas court correctly

applied this Court's own doctrine of *res judicata* is within this Court's *certiorari* jurisdiction to review.

Nonetheless, Mr. Drach also has argued that even if *res judicata* does operate as a ground of state law in this case, its application is unsupportable (Petition 24-26). The respondents agree that in the rare case where an erroneous application of state law "rises to the level of a denial of a Constitutional right," the non-federal ground will not qualify as an independent and adequate ground of state law so as to defeat this Court's *certiorari* jurisdiction (Respondents' Br. 3 n.1). Using this doctrine, which Mr. Drach has detailed in his petition, this Court has rejected otherwise independent and adequate grounds of state law, including *res judicata* itself. *See Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 476-477 (1918).

Such cases are rare because this Court "cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question." *Gryger v. Burke*, 334 U.S. 728, 731 (1948). Mr. Drach, however, does not ask this Court to review merely an erroneous decision by a state court on state law as a denial of due process under the Fourteenth Amendment. Whether the Supreme Court of Kansas erred in deciding that *res judicata* barred his claim against the unconstitutional marital discord exception is not a question presented in this case. This is because when this Court rejects a non-federal procedural ground for a decision below on a federal question as being "without any fair or substantial support," *Ward v. Bd. of County Comm'rs*, 253 U.S. 17, 22 (1920), it has jurisdiction to entertain the petitioner's federal claims not fully addressed on the merits below due to that unsupportable non-federal

ground. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458 (1958).

Regardless of whether *res judicata* operates as a federal or non-federal ground in this case, its application is without any fair or substantial support. The respondents' argument otherwise muddles the procedural posture in the lower court. They suggest that the fact that Mr. Drach could not have raised the unconstitutionality of the marital discord exception on direct appeal is a "distinction without a difference" (Respondents' Br. 4 n.2). That is hardly the case. The application of *res judicata* is limited to those claims which could not have been made in the prior litigation. Mr. Drach could not have raised his Constitutional argument about the marital discord exception because the trial court admitted the hearsay under a *res gestae* exception. (In *Gunby*, in addition to ending the marital discord exception, the Supreme Court of Kansas also struck down the *res gestae* exception once and for all. 144 P.3d at 663. In the law of Kansas, there now remains no possible exception to the hearsay rule under which the testimony at issue in this case could have been admitted at trial. *See id.*) Mr. Drach's brief in his direct appeal, contained in the respondents' appendix, makes this eminently clear. That both the direct appeal and the case at bar concerned the constitutionality of admitting certain hearsay testimony under the Confrontation Clause is immaterial, as the direct appeal concerned a *res gestae* rationale and this case concerned Kansas's marital discord rationale. Clearly, a judgment that raising the unconstitutionality of the marital discord exception was *res judicata* cannot be supported.

The respondents argue that because "the lower court did not engage in the constitutional analysis requested" by

Mr. Drach, this Court lacks the necessary jurisdiction to review the question of whether the admission of hearsay testimony under the marital discord exception violated the Confrontation Clause (Respondents' Br. 2, 5). As indicated *ante*, however, when this Court rejects a state's non-federal ground for failing to render a decision on the merits of a federal question, that is not how this Court treats the underlying question.

In *NAACP*, the petitioner had argued federal Constitutional claims before the Supreme Court of Alabama. 357 U.S. at 451. The Alabama court, however, rejected the petitioner's arguments on the basis that the petitioner had sought the wrong state appellate remedy and held that it therefore "could not consider the constitutional issues." *Id.* at 454-455. After this Court granted its writ of *certiorari* and held that the Alabama court's application of its state procedural grounds was incorrect, it did not have to remand the case to the Supreme Court of Alabama for adjudication of the federal claims below. *Id.* at 458-459. Instead, the inadequate ground of state law was as if it never were. This Court was able to reach the petitioner's claims, even though the Alabama court had not actually reached a conclusion one way or another on the petitioner's Constitutional claims.

Similarly, here, where the Kansas court's application of *res judicata* clearly was unsupportable and served only to strip Mr. Drach of his Sixth Amendment right to confront the witnesses against him, the fact that the Kansas court did not render a decision on the merits of Mr. Drach's federal claim does not prevent this Court from reaching that claim. The Kansas court denied Mr. Drach's claims under the Confrontation Clause, creating a conflict with the relevant decisions of this Court. That it erroneously

applied *res judicata* to render that denial does not defeat this Court's *certiorari* jurisdiction to hear those claims.

CONCLUSION

For the foregoing reasons, and those stated in the petition, this Court should grant its writ of *certiorari* to review the decision of the Supreme Court of Kansas in this case.

Respectfully submitted,

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